

STATE OF MICHIGAN
COURT OF APPEALS

DIANA L. ELDER, Individually and as Personal
Representative of the Estate of JAMES E. ELDER,
Deceased,

UNPUBLISHED
June 17, 2003

Plaintiff-Appellant,

v

PIONEER STATE MUTUAL INSURANCE
COMPANY and ASSIGNED CLAIMS
FACILITY,

No. 237977
Ottawa Circuit Court
LC No. 00-038439-NF

Defendants-Appellees.

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Decedent James E. Elder was riding a motorcycle owned by his son southbound in the center lane on US-31. In anticipation of moving into the left lane he looked over his left shoulder. When he looked ahead he saw that traffic had slowed to a stop or a near stop. Decedent laid the motorcycle down in the road in an attempt to avoid striking the vehicle in front of him. The motorcycle did not come into contact with the vehicle, but instead struck the guardrail. Decedent sustained injuries from which he died two days later.

Pioneer, decedent's automobile insurer, and Citizens Insurance Company, the motorcycle owner's insurer, denied plaintiff's claim for benefits. Plaintiff filed suit naming as defendants Pioneer, Citizens, and the Assigned Claims Facility.¹ Plaintiff moved for partial summary

¹ Plaintiff named the Assigned Claims Facility as a defendant because the various insurers denied her claim. During the course of the litigation plaintiff came to believe that the traffic on US-31 backed up because a concrete truck stalled on the highway. Plaintiff filed an amended complaint naming Amerisure Insurance Company, the truck's insurer, as a defendant. Plaintiff later learned that the stall occurred after decedent's accident, and dismissed Amerisure from the case. Subsequently, plaintiff also dismissed Citizens as a defendant.

disposition pursuant to MCR 2.116(C)(10), arguing that the accident arose out of the operation or use of a motor vehicle as a motor vehicle, and that pursuant to MCL 500.3114(5)(c) Pioneer was first in priority for payment of any personal injury protection (PIP) benefits due. Pioneer moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that no evidence showed that decedent's death arose out of the operation or use of a motor vehicle as a motor vehicle. The Assigned Claims Facility concurred in Pioneer's motion, and sought summary disposition pursuant to MCR 2.116(I).

Initially, the trial court granted plaintiff's motion for partial summary disposition, denied Pioneer's motion, and granted summary disposition in favor of the Assigned Claims Facility. The trial court found that while no evidence created a question of fact as to whether the vehicle immediately in front of decedent was involved in the accident, the concrete truck was involved in the accident because it stalled on the road. The trial court concluded that plaintiff was entitled to recover benefits from Pioneer under MCL 500.3114(5)(c).

Pioneer moved for rehearing, arguing that while the trial court correctly found that the vehicle immediately in front of decedent was not involved in the accident, discovery had revealed that the truck did not stall until after decedent's accident occurred. In an amended opinion the trial court granted the motion for reconsideration, removed all language dealing with the concrete truck from its original decision, and affirmed the remainder of the decision. The trial court denied plaintiff's motion for reconsideration of the amended decision. The trial court thereafter granted summary disposition in favor of Pioneer and the Assigned Claims Facility, thus resolving all pending claims.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

An insurer is obligated to pay PIP benefits for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. MCL 500.3105(1). A motorcycle is not a motor vehicle. MCL 500.3101(2)(e). However, a motorcyclist may collect PIP benefits if he is injured in an accident involving a motor vehicle. *Underhill v Safeco Ins Co*, 407 Mich 175, 186; 284 NW2d 463 (1979). In order for an injury to arise out of the operation or use of a motor vehicle as a motor vehicle, the injury must be closely related to the vehicle's function as a means of transportation. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226; 580 NW2d 424 (1998). The vehicle need not be the proximate cause of the injury; however, there must be more than an incidental or fortuitous connection between the injury and the use of the vehicle. *Keller v Citizens Ins Co*, 199 Mich App 714, 715; 502 NW2d 329 (1993). The injury must be foreseeably identifiable with the normal use of the vehicle. *Kangas v Aetna Casualty & Surety Co*, 64 Mich App 1, 17; 235 NW2d 42 (1975). For a motor vehicle to be involved in an accident, it must actively contribute to the accident. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 39; 528 NW2d 681 (1995).

Plaintiff argues that the trial court erred by granting Pioneer's motion for summary disposition. We disagree and affirm the trial court's decision. The evidence as accepted by the trial court for purposes of deciding the motions showed that traffic on US-31 slowed for an unknown reason. Decedent turned his head in anticipation of making a lane change. When he returned his attention to the traffic in front of him he noticed that it had slowed, and attempted to avoid striking the vehicle immediately in front of him by laying the motorcycle on the pavement.

The trial court correctly found that no evidence created a question of fact as to whether decedent's injuries arose out of the use of the vehicle as a motor vehicle. The vehicle was simply the last in a line of vehicles that had stopped or slowed nearly to a stop. It did not engage in maneuvers that prevented decedent from stopping, nor is there any evidence that another vehicle in the line did so. Cf. *Greater Flint HMO v Allstate Ins Co*, 172 Mich App 783, 788; 432 NW2d 439 (1988); *Bromley v Citizens Ins Co*, 113 Mich App 131, 135; 317 NW2d 318 (1982). The vehicle was merely present in front of decedent and was not "involved" in the accident. See *Utley v Michigan Mun Risk Mgmt Auth*, 454 Mich 879; 562 NW2d 199 (1997), rev'g *Utley v Michigan Mun Risk Mgmt Auth*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 1996 (Docket No. 173391). The connection between decedent's injuries and the use of the vehicle in front of him was merely fortuitous. *Keller, supra*; *Kangas, supra*.

Plaintiff's assertion that an analysis of whether the vehicle was involved in the accident was unnecessary in this case because multiple vehicles were not involved, and that only the question of whether the accident arose out of the use of a motor vehicle was relevant, is without merit. The involvement of a motor vehicle in an accident in which a motorcyclist sustains injuries is a prerequisite to the recovery of benefits by the motorcyclist under MCL 500.3114(5)(c). The statute does not require that multiple vehicles be involved in the accident. Here, the vehicle engaged in no activity that actively contributed to the accident. Rather, the vehicle's passive presence caused decedent to lay the motorcycle on the pavement. The trial court correctly found that the evidence did not create a question of fact as to whether the vehicle actively contributed to the accident. *Turner, supra*. Summary disposition was proper.

Affirmed.

/s/ David H. Sawyer

/s/ Patrick M. Meter

/s/ Bill Schuette